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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1096

LOCAL UNION No. 81 a/w Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO

Petitioner,

v.

ALLIED EMPLOYERS, INC.; SAFEWAY STORES, INC.; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NATIONAL LABOR RELATIONS BOARD; STATE OF WASHINGTON, HUMAN RIGHTS COMMISSION; CITY OF SEATTLE, OFFICE OF WOMEN'S RIGHTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

HUGH HAFER
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CRAFTSMAN & MET PRESS — SEATTLE, WASHINGTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

LOCAL UNION No. 81 a/w Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO
Petitioner,

v.

ALLIED EMPLOYERS, INC.; SAFEWAY STORES, INC.; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NATIONAL LABOR RELATIONS BOARD; STATE OF WASHINGTON, HUMAN RIGHTS COMMISSION; CITY OF SEATTLE, OFFICE OF WOMEN'S RIGHTS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgments entered by two judges of the United States Court of Appeals for the Ninth Circuit on November 12, 1975 (*infra*, pg. 19) and December 22, 1975 (*infra*, pg. 18).

OPINIONS BELOW

The district court entered on order of summary judgment dismissing Petitioner's suit on April 11, 1975 (*infra*, pp. 14-15). Rehearing was requested. Following submis-

sions on rehearing the district court narrowed the scope of its ruling but on May 19, 1975 denied the request for rehearing (*infra*, pp. 16-17). Two judges of the Ninth Circuit entered a two sentence order affirming the district court's judgment (*infra*, pg. 19) and the same judges entered a one sentence order denying Petitioner's request for rehearing and suggestion for rehearing en banc (*infra*, pg. 18). No opinions, reported or unreported, were issued.

JURISDICTION

The two judge court below entered an order of "summary affirmance" on November 12, 1975. The same two judge court denied Petitioner's request for rehearing and rejected Petitioner's suggestion of an en banc hearing on December 22, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether a court of appeals is authorized to affirm a district court judgment by action of a division consisting of less than three judges.

2. Whether a court of appeals is required to transmit a suggestion of rehearing en banc to the judges of the court who are in regular active service.

3. Whether a federal district court has jurisdiction to rule on the validity of a labor contract in a suit filed by a party to the contract where it is alleged, in duplicitous federal and state administrative proceedings, that such contract discriminates against female members of the bargaining unit. A related question is presented; namely, whether interested federal and state civil rights agencies can be joined as parties to the suit.

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STATUTES AND RULES INVOLVED

The first question requires consideration of 28 U.S.C. Sec. 46(b), Rules 1 and 27(c) of the Rules of Appellate Procedure and Rule 6(e) of the Ninth Circuit. The second question involves 28 U.S.C. Sec. 46(c), Rules 1 and 35(b) of the Rules of Appellate Procedure. Rule 12 of the Ninth Circuit is germane to the second question. The third question involves 29 U.S.C. Sec. 185 which concerns federal court jurisdiction over labor agreements. Both federal and state civil rights laws have a bearing on the third question presented by this petition. The relevant statutes and rules are set forth at pages 20-24, *infra*.

STATEMENT OF THE CASE

(The Parties)

Petitioner, Local Union No. 81 a/w Amalgamated Meatcutters and Butcher Workmen of North America, AFI-CIO ("Local 81") is a labor organization and represents employees in retail meat markets located in the Seattle metropolitan area (R. 3). Respondent Allied Employers, Inc. ("Allied") represents a substantial number of retail employers in bargaining with Local 81 (R. 3). Respondent Safeway Stores, Inc. ("Safeway") owns and operates retail stores in the Seattle area. Safeway bargains separately with Local 81 (R. 3). Local 81's collective bargaining relationship with Allied, its member employers and Safeway affects commerce within the meaning of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 141 *et seq.* ("N.L.R.A.") (R. 3).

Respondent Equal Employment Opportunity Commission ("E.E.O.C.") is a federal agency which has respon-

sibilities with respect to the enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.* ("Civil Rights Act"). Respondent National Labor Relations Board ("N.L.R.B.") is a federal agency which administers the N.L.R.A. The N.L.R.B. from time to time asserts jurisdiction over sex discrimination cases (R. 3).

The Respondent Washington Human Rights Commission is a state agency which administers a law prohibiting, *inter alia*, employment discrimination on account of sex (R. 4). Last but not least is Respondent Office of Women's Rights, an agency of the City of Seattle which enforces an ordinance prohibiting employment discrimination on account of sex (R. 4).

(The Background Events)

Local 81 concluded negotiations for a three year contract with Allied and Safeway in 1974 (R. 4). Substantially all of the market managers and meatcutters covered by the contract are men. Substantially all of the 650 meat wrappers covered by the contract are women (R. 3-4). A number of wrappers complained to Local 81 that the wage rate and cost of living articles of the contract discriminated against the meat wrappers (R. 4-5).

In December, 1974 the Respondent Office of Women's Rights issued a "Directors Charge" alleging that Local 81 discriminatorily negotiated "salary increase" and "cost of living" clauses in its contract (R. 42). A few weeks later Donna B. Castle, a member of the Local 81 bargaining unit, filed charges with the Respondent Washington Human Rights Commission. Ms. Castle alleged that Local 81 and her employer, a member of the Respondent Allied Bargain-

ing group, had forced her to quit because of her role in the issuance of the "Director's Charge" by the Office of Women's Rights (R. 50).

While charges were pending before the state human rights commission and the city Office of Women's Rights, Ms. Castle filed discrimination charges with the E.E.O.C. again alleging that Local 81's contract was discriminatory.[1] This charge was referred to the state commission which referred the charge back to the E.E.O.C. on April 15, 1975. The state commission retained jurisdiction over the retaliation charge (R. 132-133).

By early January, 1975 Local 81 divined that its contract was being attacked or about to be attacked in duplicitous city, state and federal agency proceedings. Local 81 filed suit in the district court against Allied and Safeway for the purpose of determining whether the contractual wage schedules and cost of living clauses discriminated against female members of the bargaining unit (R. 1-5). Local 81 joined as additional defendants the agencies which were in fact or apt to be interested in the dispute. By the time the case reached the motion state in the district court all of the Respondent agencies, except the N.L.R.B., had occasion to consider charges that the contract was discriminatory in structure. As of this date such charges are pending before Respondent E.E.O.C. and Respondent Office of Women's Rights of the City of Seattle.[2]

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1. The E.E.O.C. has not served a copy of the charges on Local 81. Petitioner's information concerning the E.E.O.C. proceeding was obtained from an affidavit filed by counsel for the state commission during the proceedings in the district court (R. 132-133).

2. The Washington Human Rights Commission on January 19, 1976 issued findings exonerating Local 81 from any wrong relating to Ms. Castle's termination.

(The District Court and Its Orders)

Petitioner's complaint in the district court encountered a passel of dismissal motions which were granted (*infra*, pp. 14-15). Petitioner requested rehearing and indicated a willingness to join Ms. Castle whose charges had triggered the administrative proceedings (R. 135). In further response to the defenses urged in the district court, Petitioner expressly predicated its jurisdictional claim upon Section 301 of the N.L.R.A. (R. 128; *infra*, pp. 22-23). The district court, apparently satisfied with its statutory authority and the parties actually or potentially before the court, denied rehearing on the single ground that a case or controversy (in the constitutional sense) was not presented (*infra*, pp. 16-17).

(The Court of Appeals and Its Orders)

After Petitioner's appeal was docketed in the court below, Respondent E.E.O.C. and N.L.R.B. filed motions for summary affirmance. These motions were granted in a two sentence order by a two judge court (*infra*, pg. 19). Petitioner moved for rehearing and filed a suggestion of rehearing en banc. Petitioner's motion for rehearing specifically raised the question of whether a two judge court was authorized to adjudicate a duly perfected appeal (Pet. for Rehearing, pg. 2). The two judge court which granted summary affirmance denied Petitioner's motion for rehearing and rejected Petitioner's suggestion of an en banc hearing, *infra*, pg. 18.

Petitioner was aware of prior cases in which two judge courts in the Ninth Circuit had rejected a suggestion of en banc hearing (*infra*, pg. 29). In an effort to ascertain

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whether the practice in fact followed in the Ninth Circuit was in conformity with 28 U.S.C. Sec. 46 and Rule 35 of the Federal Rules of Appellate Procedure, Petitioner directed a letter to the court below (*infra*, pg. 25) pursuant to Rule 1 of the local rules of the Ninth Circuit (*infra*, pp. 21-22). In response the Clerk of the Ninth Circuit wrote as follows (*infra*, pg. 26):

> In accordance with a policy of this court, the decision to reject the suggestion for rehearing en banc was made by the motions panel as one not requiring consideration by all the active judges. See *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, 345 U.S. 247, 257-259 (1952); 9 Moore's Federal Practice 4102, Advisory Committee note to rule 35.

The Clerk's letter avoids direct response to Petitioner's inquiry (*infra*, pg. 25) as to whether the petition for rehearing was in fact *transmitted* to the judges in the active regular service of the court. Given the tenor of the Clerk's response and the failure to answer the question properly before the court below, Petitioner can only conclude that the suggestion for en banc rehearing was not *transmitted* to the judges in the active regular service of the court.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Practice of Summary Dismissal and Affirmance of Appeals by Two Judge Courts Is in Conflict With 28 U.S.C. Sec. 46 and Calls for the Exercise of This Court's Power of Supervision

In this case (*infra*, pp. 18-19) and in other recent cases before the Ninth Circuit (*infra*, pp. 27-29) dispositive orders have been issued by two judge courts. This practice is in direct conflict with 46 U.S.C. Sec. 46(b):

> In each circuit the court may authorize the hearing

> and determination of cases and controversies by separate divisions, each consisting of three judges. (*infra*, pg. 20)

The words "consisting of three judges" do not suggest lurking ambiguity.

The Rules of Appellate Procedure adopted in 1966 "govern procedure in appeals to United States Court of Appeals . . ." (Rule 1, *infra*, pg. 20). The Courts of Appeal "may . . . make . . . rules not inconsistent with" the Rules of Appellate Procedure (Rule 47, *infra*, pg. 21). Rule 27(c) implicitly restates the three judge requirement of 28 U.S.C. Sec. 46(b) by prohibiting a single judge from dismissing or otherwise determining an appeal (*infra*, pg. 21).

The local rules of the Ninth Circuit as amended January 22, 1974 adopt the Federal Rules of Appellate Procedure (*infra*, pg. 22) and expressly recognize the three judge court tradition embodied in 28 U.S.C. Sec. 46 and Rule 27 of the Federal Rules of Civil Procedure. Local rule 6(e) provides (*infra*, pg. 22):

> Single Judge may Summon Assistance When any motion or petition is properly addressed to a single judge of the court, he may summon two other judges of the court and the three together may hear and determine the motion or petition.

The applicable statute, the Federal Rules of Appellate Procedure and the local rules of the Ninth Circuit contemplate a three judge court. In the case at bar (*infra*, pp. 18-19) and in other recent cases (*infra*, pp. 27-29) the court below inexplicably ignored the requirement of a three judge court. Petitioner suggests that the exercise of the "power of supervision" is appropriate.

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II. The Ninth Circuit's Policy of Transmitting Suggestions for En Banc Rehearing Only to Members of the Panel Which Initially Heard the Case Is in Conflict With Rule 35(b) of the Federal Rules of Appellate Procedure and Calls for the Exercise of This Court's Power of Supervision

In the Ninth Circuit suggestions for rehearing en banc are transmitted only to the panel which originally decided the case (*infra*, pg. 26). Prior to 1966 such practice was sanctioned by the decisions of this Court[3] and the local rules of the Ninth Circuit.[4] Today it is sanctioned by neither. *Cf. Moody v. Albemarle Paper Co.*, 417 U.S. 622 note 2 (1974).[5]

The Federal Rules of Appellate Procedure established rules applicable to all circuits (Rule 1, *infra*, pg. 20). Rule 35(b) of the Rules of Appellate Procedure expressly provides, with respect to suggestions for rehearing en banc, that the "clerk *shall transmit* any such suggestion to the judges of the court who are in regular active service . . . ." (*infra*, pg. 21). Although the Ninth Circuit's local rule 12 (*infra*, pg. 22) adopts Rule 35 of the Rules of Appellate Procedure, it is apparent that the Ninth Circuit in fact does not follow the mandate of Rule 35(b). (*Infra*, pg. 26).

"The en banc power . . . is . . . a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate." *Western Pacific Railroad*

3. *Western Pacific Railroad Case*, 345 U.S. 247, 250 (1953); *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 4-5 (1963).

4. *Bradley Mining Co. v. Boice*, 205 F.2d 937, 938 (9th Cir. 1953).

5. The *Moody* opinion does not address itself to the transmittal requirement of Rule 35(b).

Case, 345 U.S. 247, 260 (1953). If all of the judges in the active regular service of the Ninth Circuit had *received* a copy of the petition for rehearing and suggestion of en banc hearing it is unlikely that Petitioner's challenge to the two judge courts of the circuit would have been rejected out of hand.

The court below, as a matter of "policy," does not *transmit* suggestions for rehearing en banc to the judges of the court who are in regular active service (*infra*, pg. 26). Such *transmittal* is required by Rule 35(b) of the Rules of Appellate Procedure. Hence, this Court should exercise its power of supervision.

III. The Authority of a Federal District Court to Resolve in a Unitary Proceeding Questions Concerning the Structural Integrity of a Collective Bargaining Agreement *Vis a Vis* Claims of Sex Discrimination Is Squarely Presented By This Petition and Because of the Importance of This Unresolved Question of Federal Law Certiorari Should Be Granted

Statutory jurisdiction (Section 301 of the N.L.R.A., 29 U.S.C. Sec. 185) in the district court to rule upon the structural validity of a collective bargaining agreement which allegedly contravenes federal civil rights laws[6] or valid state laws[7] has been expressly sustained by the Third and Fifth Circuits. The contrary decision below is in direct conflict with decisions of the Third and Fifth Circuits.

The authority to join as parties the interested governmental agencies should not be seriously disputed in view of the E.E.O.C.'s petition for certioari in the *Jersey Cen-*

6. *Jersey Central Power v. IBEW*, 508 F.2d 687, 698-699 (3rd Cir. 1975) cert. pending, docket 75-182.

7. *Mobil Oil Corp. v. Oil Workers*, 504 F.2d 272, 273 (5th Cir. 1974), cert. granted Oct. 6, 1975 docket 74-1254.

tral case pending before this Court. With respect to *Jersey Central*—a Section 301 suit by an employer against a union in which the E.E.O.C. was joined—the Solicitor General has said (Memorandum For the United States As Amicus Curiae, Case No. 75-182, pp. 4-5 note 2):[8]

> EEOC, however, is undoubtedly a proper party to this case with respect to the contractual issues raised by *Jersey Centarl's* complaint, and its status as a party probably means that it will be bound by the judgment as a matter of *res judicata*. See ALI, *Restatement of Judgments*, § 77 (1942). And see Pet. App. 62.

At this juncture it does not appear that the Respondent N.L.R.B. or the Respondent Washington Human Rights Commission have taken or are likely to take an interest in the allegedly discriminatory structure of the Local 81 agreement. Accordingly, Petitioner does not controvert the finding below that no case or controversy exists insofar as those two agencies are concerned. However, active cases involving the structural integrity of Petitioner's labor agreement have been and are pending before Respondent E.E.O.C. and Respondent Office of Women's Rights. These cases presented and present a genuine, clear and imminent danger to Petitioner. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-422 (1975).[9]

The practical civil rights litigation problems facing labor and management are unmanageable. An arbitra-

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8. *See also: Southbridge Plastics Div. v. Local 759*, — F. Supp. —, 11 BNA FEP Cases 703 (N.D. Miss. 1975)—EEOC joined as a party in a suit filed by employer against union. EEOC successfully overcame jurisdictional defenses asserted by union against EEOC's cross claim.

9. Perhaps the EEOC and the Office of Women's Rights will conclude their activities during the pendency of this case. Such an event would not moot the case. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-126 (1974).

tion award does not bind a civil rights claimant. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1975). Separate and independent claims are created by the Civil Rights Act of 1964 and 42 U.S.C. Sec. 1981. *Johnson v. Railway Express Co.*, 44 L.Ed.2d 295 (1975). A judgment in a "fair representation" case does not bar a "civil rights" suit.[10] Similarly the successful defense of state discrimination charges does not bar proceedings under the Civil Rights Act of 1964[11] or 42 U.S.C. Sec. 1981.[12] Nor does a court approved settlement of a private suit under the Civil Rights Act of 1964 bar an E.E.O.C. suit based upon the same charges.[13]

Given the doctrine of non-finality which has evolved in civil rights cases, union and employers cannot afford to sit idly by while class action back pay and damage liability accrues. Where, as here, the structural integrity of the contract is under attack a declaratory judgment proceeding, bottomed upon Section 301 of the N.L.R.A., 29 U.S.C. Sec. 185, is the only practical device available. If the contract is found to be faulty it can be renegotiated. If it is found to be valid the union and employer have some assurance that the agreement is in fact free from fault. Absent the availability of the procedure invoked by Petitioner, labor and management must await the outcome of non-binding administrative determinations. By the time such determinations are tested in the courts the contract will

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10. *Stevenson v. Int'l. Paper Co.*, 516 F.2d 103, 108-111 (5th Cir. 1975).

11. *Batiste v. Furnco Corp.*, 503 F.2d 447, 550 (7th Cir. 1974).

12. *Wageed v. Scheniut Industries*, — F. Supp. —, 11 BNA FEP Cases 1226 (D. Md. 1975).

13. *E.E.O.C. v. Kimberly Clark Corp.*, 511 F.2d 1352, 1361-1363 (6th Cir. 1975).

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have expired. Any efforts to correct an expired agreement will be more than a day late and a dollar short.

Whether Section 301 of the N.L.R.A. will support a suit for declaratory judgment where, as here, the labor contract is being attacked before federal and state civil rights agencies is a question of national concern which should be decided by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HUGH HAFER
Counsel for Petitioner

APPENDIX A

ORDERS OF THE COURTS BELOW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCAL UNION No. 81, a/w Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (referred to as "Local 81"), *Plaintiff*, v. ALLIED EMPLOYERS, INC. (referred to as "Allied"); SAFEWAY STORES, INC. (referred to as "Safeway"), et al., *Defendants.*	No. C75-15S ORDER ON DEFENDANTS' MOTIONS TO DISMISS

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
APRIL 11, 1975
EDGAR SCOFIELD, *Clerk*
By ....., *Deputy*

After considering the arguments made by counsel in their briefs and at oral argument, the Court GRANTS the motions of the several defendants to dismiss because of the failure of subject matter jurisdiction to attach.

(1) As to Allied Employers, Inc. and Safeway Stores, there currently exists no justiciable case or controversy with plaintiff.

(2) A proper federal question for purposes of jurisdic-

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tion under 28 U.S.C.A. § 1337 as to the National Labor Relations Board and the Equal Employment Opportunity Commission is not framed by the complaint. The complaint asks for a declaration of plaintiff's rights and liabilities under a collective bargaining agreement. Any potential federal question under the Enabling Acts applicable to these agencies would arise only by way of anticipation or avoidance of defenses by the agencies.

(3) Pendent jurisdiction over the Office of Women's Rights and the Human Rights Commission fails because no party properly before the Court exists to which these claims coud be appended. Further, the Ninth Circuit does not recognize pendent parties. *Hymer v. Chai,* 407 F.2d 136 (9th Cir. 1969).

IT IS SO ORDERED.

Judgment is to be entered accordingly.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 11th day of April, 1975.

/s/
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCAL UNION No. 81, a/w Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (referred to as "Local 81"), *Plaintiff*, v. ALLIED EMPLOYERS, INC. (referred to as "Allied"); SAFEWAY STORES, INC. (referred to as "Safeway"), et al., *Defendants.*	No. C75-158 ORDER DENYING MOTION FOR RECONSIDERATION

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
MAY 19, 1975
EDGAR SCOFIELD, *Clerk*

By ....., *Deputy*

With the concurrence of the employers who were named defendants in this action, plaintiff Union seeks to join a woman employee covered by the collective bargaining agreement in question and to have the Court determine the parties' respective rights and liabilities under that agreement in light of Title VII of the Civil Rights Act of 1964. Jurisdiction is premised upon 29 U.S.C.A. § 185. To show that there is a Constituional case or controversy, it is alleged that the woman plaintiff seeks to join has instituted complaints with local, state and federal agencies charged with administering fair employment laws.

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Assuming joinder of the additional party, this Court finds that the purported contract dispute is still too hypothetical and abstract to satisfy the case and controversy requirement of Article III of the Constitution.

The motion to reconsider the Order of April 11, 1975, is therefore DENIED.

IT IS SO ORDERED.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 19th day of May, 1975.

/s/
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION No. 81, a/w AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Plaintiff-Appellant,
v.
ALLIED EMPLOYERS, INC., et al.,
Defendants-Appellees.

No. 75-2608
ORDER

FILED
DEC. 22, 1975
EMIL E. MELFI, JR.
Clerk, U. S. Court of Appeals

Before: CHOY and WALLACE, Circuit Judges.

Appellant's motion for rehearing is denied and its suggestion for rehearing en banc is rejected.

/s/

/s/
United States Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMALGAMATED MEAT CUTTERS, LOCAL 81, *Plaintiff-Appellant,* v. ALLIED EMPLOYERS, INC., et al., *Defendants-Appellees.*	No. 75-2608 ORDER

FILED
NOV. 12, 1975
EMIL E. MELFI, JR., *Clerk*
U. S. COURT OF APPEALS

Before: CHOY and WALLACE, Circuit Judges.

Upon due consideration of the motions to dismiss or for summary affirmance, the district court's orders of April 11, 1975 and May 19, 1975 are hereby affirmed. The motion to defer filing of brief is denied as moot.

/s/

/s/
United States Circuit Judges

APPENDIX B

STATUTES AND RULES

28 U.S.C. Sec. 46:

§ 46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

Rules of Appellate Procedure

Rule 1

(a) Scope of Rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.

(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the court's of appeals as established by law.

Rule 27(c)

(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

Rule 35 (b)

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A Party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard en banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

Rule 47

Each court of appeals by action of a majority of the circuit judges in regular active service from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Rules of the Ninth Circuit

Rule 1

All communications to the court shall be addressed to the clerk at the United States Court of Appeals, Post Office Box 547, San Francisco, California, 94101. When it is intended that a communication come to the personal attention of a judge or judges, sufficient copies, not includ-

ing the original, shall be supplied to the clerk so that he can furnish a copy to each judge.

Rule 5

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, whenever relevant, are adopted as part of the rules of this court. In cases where the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit are silent as to a particular matter of appellate practice, any relevant rule of the Supreme Court of the United States shall be applied.

Rule 6(e)

(e) Single Judge may Summon Assistance. When any motion or petition is properly addressed to a single judge of the court, he may summon two other judges of the court and three together may hear and determine the motion or petition.

Rule 12

Where a suggestion of the appropriateness of a rehearing in banc, made pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is made as part of a petition for rehearing, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the combined petition and suggestion, and unless this is done the court shall not be required to consider such suggestion.

Where a petition for rehearing contains a suggestion for a rehearing in banc, there should be filed, in addition to the original petition, twenty-four copies.

National Labor Relations Act, as amended,
Section 301, 29 U.S.C. Sec. 185

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees

in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall been enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Civil Rights Act of 1964, as amended,
Sec. 704, 42 U.S.C. Sec. 2000e-2:

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this title, or because

he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

APPENDIX C

INQUIRY TO COURT BELOW; PRIOR TWO JUDGE ORDERS IN THE COURT BELOW

December 29, 1975

Clerk of Court
United States Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

Re: *Meatcutters Local 81 v. Allied Employers, Inc., et al.* No. 75-2608

Dear Sir:

Pursuant to Rule 1 we wish to inquire of each of the Judges in regular active service whether:

1. Each in fact received a copy of our petition for rehearing and suggestion en banc; and
2. One or more requested a vote on such suggestion.

Copies of this letter—one for each of the Judges—are enclosed.

Very truly yours,
Hugh Hafer
Counsel for Appellant

HH:prs
Enc.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

January 22, 1976

Hugh Hafer, Esquire
Hafer, Cassidy & Price
Attorneys at Law
Suite 400, 2701 First Avenue
Seattle, Washington 98121

Re: No. 75-2608, *Meatcutters Local 81 v. Allied Employers, Inc., et al.*

Dear Mr. Hafer:

In response to your letter of December 29, 1975, in reference to the above-captioned matter, please be advised as follows:

In acordance with a policy of this Court, the decision to reject the suggestion for rehearing en banc was made by the motions panel as one not requiring consideration by all the active judges. See *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, 345 U.S. 247, 257-259 (1952); 9 Moore's Federal Practice 4102, Advisory Committee note to Rule 35.

Sincerely yours,
/s/ EMIL E. MELFI, JR.
Emil E. Melfi, Jr.
Clerk of Court

EEM:pn

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD W. HASBROUCK, *Plaintiff-Appellant,* v. SHEET METAL WORKERS LOCAL 232, etc., et al.	No. 74-2673 No. 75-1577 ORDER Dismissing Appeals

FILED
July 2, 1975
Emil E. Melfi, Jr.
Clerk
U.S. Court of
Appeals

Before: CHAMBERS and ELY, Circuit Judges.

Upon due consideration, the motions to dismiss are granted and these appeals are dismissed. Rule 54(b) Federal Rules of Civil Procedure. Should the district court certify under Rule 54(b), Federal Rules of Civil Procedure, its previous orders and should an appeal from such an order be promptly perfected, this Court will entertain a motion in the new appeal to hear said appeal on the basis of the record and briefs in these appeals, properly supplemented.

/s/ _____

/s/ _____
U.S. Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY COMEAU, SHIRLEY GLENN RICH, GEORGIA GRANT, DELORES LYDE, JEANETTE SNOWDEN, DOROTHY ANDERSON ALVORD, KATHLEEN BROWN, JUDY GILL, LAURIE TRUJILLO, VALERIE VIKE, JOHANNA ENDT and TERI ANN SHARP,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
Respondent.

PAY 'N SAVE CORPORATION,
Defendant and Real Party in Interest

No. 75-1588
ORDER

FILED
March 31, 1975
Clerk
U.S. Court of
Appeals

Before: GOODWIN and WALLACE, Circuit Judges

Upon due consideration, petitioners' application for a writ of mandamus or prohibition is denied.

/s/ ALFRED T. GOODWIN

/s/ J. CLIFFORD WALLACE

U.S. Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY COMEAU, SHIRLEY GLENN RICH, GEORGIA GRANT, DELORES LYDE, JEANETTE SNOWDEN, DOROTHY ANDERSON ALVORD, KATHLEEN BROWN, JUDY GILL, LAURIE TRUJILLO, VALERIE VIKE, JOHANNA ENDT and TERI ANN SHARP, *Petitioners,* v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON *Respondent,* PAY 'N SAVE CORPORATION, *Defendant and Real Party in Interest.*	No. 75-1588 ORDER FILED May 23, 1975 Emil E. Melei, Jr. Clerk U.S. Court of Appeals

Before: GOODWIN and WALLACE, Circuit Judges.

The petition for rehearing with suggestion for rehearing en banc filed April 14, 1975, by the petitioners Shirley Comeau, et al., is treated as a petition for reconsideration and is Denied.

/s/ ALFRED T. GOODWIN

/s/ J. CLIFFORD WALLACE

U.S. Circuit Judges